No. 15-114919-S

IN THE SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS,
Plaintiff-Appellee,

vs.

FRAZIER GLENN CROSS, JR.,
Defendant-Appellant.

REPLY BRIEF OF APPELLANT

Appeal from the District Court of Johnson County, Kansas
Hon. Thomas Kelly Ryan
District Court Case No. 14 CR 853

Reid T. Nelson, #12726
Capital and Conflicts Appellate Defender
Capital Appeals and Conflicts Office
701 SW Jackson, 3rd Floor
Topeka, KS 66603-3714
(785)296-1833
Fax: (785) 296-7418
rnelson@sbids.org
Attorney for Appellant

No. 15-114919-S

IN THE SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS,
Plaintiff-Appellee,

vs.

FRAZIER GLENN CROSS, JR.,
Defendant-Appellant.

REPLY BRIEF OF APPELLANT

Issue No. 1: The trial court erred in allowing Mr. Cross to proceed pro se in the penalty phase of his capital trial. As a result of his self-representation, the penalty phase failed to satisfy the heightened reliability requirements of the Eighth Amendment to the United States Constitution and Section Nine of the Kansas Constitution Bill of Rights.

In its brief, the State combined Issues 1 and 4 into Issue 1. Responding to Appellant's Issue 1, it argues that *Faretta v. California*, 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975), grants the defendant in a capital case the right to self-representation. However, The State did not address arguments that a penalty phase requires heightened reliability which was not achieved in this case, or that *Faretta* was not a capital case.

Issue No. 2: Reversal of the penalty phase is required because Mr. Cross was allowed to represent himself without an informed and knowing waiver of his right to counsel, in violation of the Sixth Amendment.

The State argues that the trial court gave all the warnings set forth in *Barbara, Kansas Criminal Law Handbook (1992), as* cited in *State v. Lowe*, 18 Kan. App. 2d 72, 76, 847 P.2d 1334, 1338 (1993). These warnings do not address, however, a defendant's knowledge of the specific proceedings and punishment.

The warnings in *Barbara* were not complied with. The colloquy was deficient in the following ways:

The trial court did not receive an unequivocal response from Mr. Cross.

Mr. Cross initially asked the court to discharge his attorneys, indicating he wanted to "talk" to the court. (R. **36**, 9, 13). After the court's colloquy, Mr. Cross confirmed that he had only wanted to waive counsel to speak to the court about the plea bargain and to get internet access, which he acknowledged was accomplished. (R. **36**, 47-48). Having accomplished his stated goal of a limited waiver so he could speak to the court, his intent to waive counsel for the guilt and penalty phases was unclear. A waiver must be unequivocal. *State v. Graham*, 273 Kan. 844, 850, 46 P.3d 1177 (2002). See *State v. Lowe*, 18 Kan. App. 2d 72, 76, 847 P.2d 1334, 1338 (1993)(At the end of the *Barbara* inquiry, the court must ask if the defendant still wants to proceed with self-representation.)

Core waiver requirements were not addressed by the trial court.

The State sets forth the following additional core requirements of a waiver colloquy, which go to the defendant's understanding of the proceedings and punishment.

> "...the nature of the charges, the statutory offense included within them, the range of allowable punishments thereunder, possible defense to the charges and

> circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter."

(Appellee's Brief, p. 53) (citing *Fowler v. Collins*, 253 F.3d 244, 249 (6th Cir. 2001)).

However, the colloquy as to the guilt phase lacked reading the charges, the range of punishment, and additional facts "essential to a broad understanding."

The colloquy as to the penalty phase lacked a reading of the aggravating circumstances, even though the prosecution charged two. (R. **5**, 231-232). It also lacked the range of punishment, and additional facts essential to broad understanding, such as the nature of aggravating or mitigating circumstances, burden of proof, and weighing.

The State's response is that Mr. Cross was "clearly informed" of the above requirements at some time other than during the attempted waiver. (Appellee's Brief, p. 70). However, in most cases this occurred well after the waiver colloquy. The colloquy must inform a defendant of matters when the defendant attempts to waive counsel, not later. See *Von Moltke v. Gillies*, 332 U.S. 708, 724, 92 L.Ed. 309, 68 S.Ct. 316 (1948)(waiver of counsel is understandingly made only from "a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.") This issue is whether his waiver of counsel was made with full understanding, not whether he learned things later.

a. State's burden to prove aggravators beyond a reasonable doubt.

The State argues that Mr. Cross knew about the State's burden to prove aggravating factors, because "a month after Cross proceeded pro se" the prosecution pointed it out. (Appellee's Brief, p. 71). But this was after the waiver hearing, when it was too late.

b. The jury's role in assigning weight to mitigating circumstances.

The State argues Mr. Cross knew about the nature of mitigating circumstances, which is reflected both in a motion he filed and in a proposed instruction the prosecution submitted. (Appellee's Brief, p. 71). However, they both appear to have been filed well after the waiver-of-counsel hearing.

c. Requirement of jury unanimity.

The State argues that Mr. Cross knew about the unanimity requirement, because the prosecution filed a proposed instruction setting out the requirement and because at the penalty phase Mr. Cross argued the concept. (Appellee's Brief, pp. 71-72). But both instances occurred long after the waiver hearing.

The initial attempted waiver of counsel does not continue "indefinitely," to include the penalty phase, because the penalty phase was not knowingly waived at that hearing.

The State's position is that the attempted waiver of counsel, made prior to trial, continues "indefinitely," and includes the penalty phase. However, this presumes there was a knowing waiver of penalty-phase counsel at the initial hearing. Whereas, at that initial hearing he was not even read the aggravating factors, which in a capital trial operate as the functional equivalent of elements of an offense. See *Ring v. Arizona*, 536 U.S. 584, 153 L.Ed.2d 556, 122 S.Ct. 2428 (2002). Without knowledge of even the most fundamental aspects of the penalty phase, like the charge, or the full range of punishment and nature of mitigation, there could be no knowing waiver of counsel for it.

Issue 3. The court committed reversible error when it failed to direct Mr. Cross' three standby counsel to present a legitimate case in mitigation. The failure to have a reliable mitigation case presented to the jury violated the heightened reliability

requirements of the Eighth Amendment to the United States Constitution and Section Nine of the Kansas Constitution Bill of Rights.

The State argues that the case at bar is distinguishable from *Muhammad v. State*, 782 So.2d 343 (Fla. 2001), because in the case at bar Mr. Cross *did* present and argue mitigation evidence. (Appellee's Brief, p. 76).

However, presenting some mitigation is insufficient. A thorough case is required. With no ability to screen himself for psychological disorders, and no presentation of his childhood or a life story, the holes in the mitigation case outgrew the case he presented. Proceeding on a pro se theory that a mysterious one-world government was taking over the world, he subjected the jury to bizarre exhibits and inflammatory comments. It was worse than presenting no mitigation case at all.

Prejudice occurred because attorneys were not appointed for mitigation.

The State asserts there was no prejudice in not having counsel present mitigation, because Mr. Cross made arguments for life. (Appellee's Brief, p. 80). However, his arguments were filtered through the lens of his conspiracy theory, and were coupled with repugnant ideas like this, "(F)ollow your conscience…And you all are Aryan, white, so I know you got consciences." (R. **48**, 145). This was worse than no mitigation.

The error is not harmless, because the mitigation case had too many gaps.

Under its harmless error argument, the State points out the record is devoid of evidence that other mitigating evidence could have been presented. (Appellee's Brief, p. 82). However, see Appellant's brief for the full discussion of the human frailties and

psychological problems that are typically required as part of mitigation. (Appellant's Brief, p. 50).

The case lacks mitigating evidence, in large part because the prosecution succeeded in convincing the court to discharge Mr. Cross' attorneys, leaving an unprepared, infirm defendant in charge.

Defense attorneys could have presented psychological evidence that he suffered from a delusional disorder, which is a "serious mental illness" involving an unshakable belief in something untrue, such as being conspired against. Cleveland Clinic, *Delusional Disorder,* https://my.clevelandclinic.org/health/diseases/9599-delusional-disorder (last reviewed on 1-23-18) (referencing American Psychiatric Association, and DSM-5).

A jury could have also heard that he did not choose to have the disorder, and it has a genetic basis. See Diagnostic and Statistical Manual of Mental Disorders (DSM-5), p. 93 (5th Ed. 2013) (involves a "significant familial relationship.") And, relevant to Mr. Cross' advanced age, people with "major neurocognitive disorder" (which includes dementia) may present with persecutory delusions. DSM 5, p. 93. Also, relevant to evidence that Mr. Cross served combat tours, delusional disorder has been associated with trauma experiences and PTSD. See Arehart-Treichel, *PTSD not only Disorder Triggered by Trauma*, Psychiatric News (2007), https://psychnews.psychiatryonline.org/doi/full/10.1176/pn.42.9.0015 (last visited July 30, 2018)(reporting on results of a study in the British Journal of Psychiatry, concluding

that those who experience trauma, particularly with resulting PTSD, are more likely to experience delusions).

The error was not harmless based on overwhelming evidence.

The State asserts that the evidence of aggravation was overwhelming, citing all the reasons in the prosecution's closing argument for death. (Appellee's Brief, 85). However, it is not a question of the strength of an aggravator. The statute requires the jury to weigh that aggravator against mitigators. K.S.A. 21-6617. The State is not factoring in that defense attorneys could have put weighty mitigating evidence on the other side of the scale. The State must prove beyond a reasonable doubt that failing to appoint counsel to present mitigation did not contribute to the death verdict. *State v. Cheever*, 295 Kan. 229, 257, 284 P.3d 1007 (2012). It cannot do so. In fact the State admits that Mr. Cross' core case, his "belief system" mitigator, was actually an aggravator. (Appellee's Brief, p. 86).

Issue 4. The trial court erred in failing to consider whether Mr. Cross was a "gray-area" defendant, who had mental issues that would render him incompetent to represent himself in a complex capital case.

The State applies an incorrect standard.

The State argues this issue under an incorrect standard, stating: "*Absent a clear showing* that he was incompetent, Judge Ryan did not have the authority to take away Cross' right to represent himself." (Appellee's Brief, p. 51) (Emphasis added). However, this issue presents a procedural competency claim, because the trial court failed to determine whether Mr. Cross was competent to self-represent. The standard requires that the court hold a competency hearing when it has doubt with respect to competency—

in our case competency to self-represent— at any time during trial. *McGregor v. Gibson*, 248 F.3d 946, 953 (10th Cir. 2001).

Under K.S.A. 22-3302, a hearing on competency is required if the court has "reason to believe" the defendant cannot "make or assist" in making his defense. See also *United States v. Ferguson*, 560 F.3d 1060, 1068 (9th Cir. 2009)(court orders remand for determination on competency to self-represent, because there were "many indications in the record that *Edwards* might apply.")

The State recognizes that *Indiana v. Edwards*, 554 U.S. 164, 177, 171 L. Ed. 2d 345, 128 S. Ct. 2379 (2008) placed the "onus" on trial judges to make this determination (Appellee's Brief, p. 25), but there is no indication the court applied *Edwards* or was aware of it, so remand is required. See *State v. Lane*, 362 N.C. 667, 669 S.E.2d 321 (2008) (remanded because court did not make *Edwards* determination).

Competency for passive role of standing trial is not the same as competency to self-represent.

To support Mr. Cross' competency to self-represent, the State first points to the competency evaluation and hearing. (Appellee's Brief, p. 30) (R. **31,** 3-4). However, the trial court only considered Mr. Cross' competence under the *Dusky* standard to perform the passive role required to stand trial. It did not address Mr. Cross' competency to shoulder the much larger role of representing himself in a capital case.

The State also suggests that the Johnson County Mental Health Center diagnosed Mr. Cross as having only "mild depression." (Appellee's Brief, p. 30). However, the

report offers no diagnosis. Mr. Cross self-reported taking antidepressants. (R. **55**, competency report).

From this short report, however, there already emerges evidence of mental illness, such as a delusional disorder. It states that Mr. Cross wanted to argue these things at trial:

- The killings were justified, and "defended by the Constitution and the Declaration of Independence." (R. **55**, competency report).
- The "justification defense" could work and he intended to call David Duke and Pat Buchanan as witnesses. (R. **55**, competency report).
- There was only a "possibility" that "the jury would disagree with his defense and sentence him to death or to life in prison." (R. **55**, competency report, 4).

At a hearing for competency, the court learned that Mr. Cross wanted to go to death row for more access to television, and the court learned from his attorney that Mr. Cross' chosen defense would result in a quick death verdict. (R. **26**, 8, 9)

This is evidence of a severe mental disorder—delusional or paranoid—which would effect his ability to defend at trial. See *Indiana v. Edwards*, 554 U.S. 164, 177, 171 L. Ed. 2d 345, 128 S. Ct. 2379 (2008)(mental illness can impair defendant's ability to self-represent).

The State also argues that Mr. Cross had the ability to defend himself, because he filed 15 pretrial motions. (Appellee's Brief, p. 30). These filings cast even further doubt on his ability to defend:

- Mr. Cross' Affidavit: He writes that he mistrusts his attorneys "for blatantly obvious political and societal reasons." (R. **5**, 24).
- Motion for acquittal: He requests dismissal of all charges and immediate release because, "This ongoing genocide is known by all intelligent citizens." (R. **5**, 161).
- Motion on "full control of all monies": He points out he does not trust his standby counsel to work in his interest. (R. **5**, 166).
- Motion to compel: He writes that the DA will "protect his masters (the jew) in order to continue his status quo and to keep exposure of the JOG a secret from the general population." (R. **5**, 167).
- Motion on "obstruction of justice": He writes that the trial judge is a "Mason," controlled by Jews. Criticism of the Jews is his defense. (R. **5**, 169-170).
- Motion for "Private Researcher": He chooses a friend over his capital attorney. (R. **5**, 217).
- Defendant's "Response Brief": He writes that if the judge swears that he is not a high ranking Mason, Mr. Cross will allow the judge to continue to sit on the case. (R. **5**, 220).
- Motion for "Justification Defense": He writes that when the "collapse" comes, military bases and "nukes" will be surrendered to "people of color." (R. **5**, 222).
- Supplemental Motion: He states that the DA will be rewarded for beating Mr. Cross in court by gaining "at least a US Senate seat" where he will join in "plundering millions from gullible taxpayers." (R. **5**, 226).

- Defendant's input for jury instruction: He requests an instruction that if jurors find the defendant is "far more important to the homeland security" it may vote not guilty on all charges. (R. **5**, 298).

While the State asserts that defendant's acts were "rational" and "methodical" (Appellee's Brief, p. 33), in its pretrial motion filed July 13, 2015, the prosecution held the opposite view, stating: "There is no relationship whatsoever between these victims and the worldwide conspiracy alleged in the defendant's pleadings." (R. **5**, 214). Thus, the prosecution recognized that Mr. Cross was trying this case while suffering from fixed, false beliefs, involving conspiracies.

The State argues that he was able to defend because he argued his motions. (Appellee's Brief, p. 30). But his arguments revealed the same paranoia, delusional disorder, or senile dementia that is suggested by his motions.

- Hearing of June 10, 2015: He argues there would be "underhanded things going on in the court between you (court) and the DA that will prevent anybody from being on that jury that is against the death penalty." (R. **37**, 220).
- Hearing of July 17, 2015: He intends to choose jurors by religion and ethnicity, preferring blacks and Hispanics because they had "guts." Whites would give him the death penalty as they are afraid of "facing the public." (R. **38**, 67-68).
- At the motion to address his health needs, he accused the prosecutor of staring at him "directly" for "a good sixty seconds." (R. **15**, 100-101).

The State argues that he was able to conduct voir dire. But jurors were thereby subjected the spectacle of these irrational questions:

- "Do you believe that the mainstream media is controlled or do you believe it's free?" (R. **41**, 240)
- "Do you prefer a one world government or do you prefer an independent sovereign America?" (R. **41**, 243).
- "(Y)ou have an opportunity to take a serial killer off the street…why wouldn't you jump at this opportunity?" (R. **42**, 47).
- "(T)hey consider me a white supremacist…but you consider me a bad person because I'm that way, don't you?" (R. **42**, 119).
- Questioning why one juror, believing he killed three people, wouldn't want to be patriotic and take him "off the street." The juror told him to do the honorable thing by pleading guilty and "get this circus over with." (R. **43**, 108).

Jury selection was a total disaster that irreparably affected the rest of his trial. He was incapable of defending himself *in any meaningful way.*

Mr. Cross' racism is not evidence that he was competent to self-represent.

The State argues Mr. Cross was racist, which is not a mental illness according to the DSM. (Appellee's Brief, p. 32). However, racism is not evidence of competency. His behavior in and out of court fits the DSM definition of delusional disorder of a "persecutory" subtype, which is a fixed belief that one is being conspired against. People suffering from persecutory delusions may become angry and resort to violence.

Significantly, it is "usually late age onset." Diagnostic and Statistical Manual of Mental Disorders (DSM-5), pp. 90-92 (5th Ed. 2013).

These disorders are serious enough to be detectable by brain imaging, which can detect abnormalities in individuals with delusional disorders. Vicens V et al., *Structural and functional brain changes in delusional disorder.* Br. J. Psychiatry, 2016, https://www.cambridge.org/core/journals/the-british-journal-of-psychiatry/article/structural-and-functional-brain-changes-in-delusional-disorder/4C4D1B01C68D86FB4A56F776C0A41CDC/core-reader. (last visited July 30, 2018).

The prosecution invited error.

The State argues that Mr. Cross got the trial he asked for and wanted. (Appellee's Brief, p. 33). However, it is far more accurate to say that Mr. Cross got the trial the prosecutors asked for and wanted, which was an insurmountable mismatch.

When Mr. Cross' request to discharge his attorneys surfaced, the court was rightly concerned about reliability of trial proceedings, and hoped Mr. Cross could discuss it with his attorneys. The prosecution not only forced the issue, but insisted that the defense attorneys be discharged:

THE DEFENDANT: How do I fire them?
THE COURT: Sir—
THE DEFENDANT: The Defendant: How do I—
THE COURT: You can talk with them about that, all right?
THE DEFENDANT: Talk to them about firing them?
THE COURT: That's right. All right, counsel—

> **MR. HOWE**: Judge, based on our previous statements of the law, if he wants to fire his lawyers, that's his decision. But he has to conduct himself in an appropriate way. ***...[I]f he wants to fire them and represent himself the case law is abundantly clear...anything we do subsequent to that can be undone if we don't honor his request.***"

(R. **36**, 10) (Emphasis added).

Therefore, the only limitation that the prosecution informed the court of, was that if he misbehaved standby counsel could step in. (R. **36**, 10).

By arguing that the court's hands were tied, without mentioning the competency limitation of *Edwards*, the prosecution convinced the court to remove the defense attorneys. (R. **26**, 9). The prosecution did this, even though it had observed severe misconduct by Mr. Cross, as well as manifestations of a delusional disorder or senile dementia. At preliminary hearing, for example, it heard Mr. Cross yell at a spectator "blood sucking parasite" (R. **33**, 344), and *moments before* requesting the court to grant him pro se status, it heard him tell the court, "You got orders from Jews not to let me criticize Jews." (R. **36**, 8).

When the prosecution undertook to advise the court, it had an obligation to advise the court fully. It had an obligation to request that the court use its clear authority, which was amply supported by caselaw, to: have him examined, hold hearing, and make a determination on his mental competency to self-represent, based on *Edwards*. It had an obligation to inform the court that it could and should deny self-representation based on misbehavior. See *State v. Plunkett*, 261 Kan. 1024, 1029, 934 P.2d 113, 117 (1997)(court may end self-representation based on disruptive behavior).

No one deserved the trial the prosecution asked for. The insurmountable mismatch it created, between the prosecution and an unprepared, delusional defendant, forced jurors to watch a spectacle, jeopardized the defendant's right to a fair trial, undermined the dignity of the courtroom, and compromised this Court's ability to comply with the statutory mandate to review the case for any arbitrary factor.

The State argues that Mr. Cross' decisions were "rational and methodical" (Appellee's Brief, p. 33), but cites for support his warning to the white race of impending extermination, and his desire to be a martyr. (Appellee's Brief, p. 33). Pursuing delusional and paranoid goals does not make one competent.

Mr. Cross' response to being uncomfortable at JCABC—of wanting to proceed to death row—was not evidence of rationality.

The State indicates Mr. Cross' decisions were logical, citing that Mr. Cross wanted to proceed to death row because the jail was "uncomfortable." He also believed the nurses were trying to kill him. (Appellee's Brief, p. 34). This is irrational thinking directly affecting his handling of the case.

The State's position is that because he maintained focus on his compelling necessity defense, he was rational. (Appellee's Brief, p. 41). However, when unshakable delusions interfere with capital sentencing, *Edwards* counsels against allowing pro se representation. C.f. *U.S. v. Veatch*, 842 F.Supp. 480 (W.D. Okla. 1993)(defendant was not competent to assist attorneys, because of severity of paranoia and narcissism).

The State argues that because Mr. Cross' racist beliefs were genuine, and he openly wanted to be a martyr, there was not a problem with his pro se representation.

(Appellee's Brief, p. 42). But Mr. Cross had no legal authority to require the State to participate in state assisted suicide, nor did he have legal authority to force jurors to sit through a spectacle. See Appelbaum, M.D., *Criminal Defendants who Desire Punishment*. 18 Bull Am Acad Psychiatry Law (1990), available at, http://jaapl.org/content/18/4/385. (A defendant's stated desire for punishment could be influenced by psychosis, affective disorders, or cognitive impairments.)

Continual disruptions reflected a mental disorder, and provided ongoing independent grounds to end the spectacle created by self-representation.

The State argues that Mr. Cross continually tried to disrupt the criminal proceedings. (Appellee's Brief, p. 44). However, disruptive behavior is associated with some severe mental illnesses. See DSM 5, p. 92 (pointing out that people with delusional disorder can engage in "antagonistic behavior".)

The State has recounted many instances of Mr. Cross' misconduct throughout trial proceedings. Therefore, it is apparent that the prosecution could have simply ended the debacle created by his self-representation by requesting, after even one such incident, that self-representation be terminated. Had it done so, however, it would then have had to litigate the capital case against an evenly matched professional team.

The State points to Mr. Cross' disruptive comments during voir dire, when he said, "(C)luck, cluck, cluck…All the young guys, they're chicken," and calling the potential jurors, "(B)rainwashed idiots." (Appellee's Brief, p. 44, 45). These, and other comments that surfaced continually during trial, however, should have created bona fide doubts

about his ability to self-represent, triggering an appropriate evaluation, hearing, findings, and a probable end to the spectacle that was being created.

Phone call to friend reflects presence of an active psychosis.

The State argues that his jail phone call shows intent to disrupt. (Appellee's Brief, p. 47). But even more, it shows genuine irrational thinking. In that phone call Mr. Cross confides that he can only argue the defense-by-necessity at the sentencing phase, when it will not do him any good. He confides: "***It [defense of necessity] won't do me any damn good after the verdict. I can beat this thing***. It was not murder it was a revolutionary act like George Washington." (R. **54**, State's exhibit 192, 6:10-6:20) (Emphasis added). Mr. Cross genuinely held a fixed and irrational belief that he could win the jury to his revolutionary cause, and sought not just to influence one juror in the penalty phase, but to gain an outright acquittal of the charges.

Conclusion

The State points out that the right to represent oneself is "sacred" and "any violation is reversible error." (Appellee's Brief, p. 51). By omitting the competency-limitation to the right of self-representation, however, the State advances the same erroneous legal argument by which the prosecutors convinced the trial court to discharge Mr. Cross' lawyers. There was nothing sacred about the spectacle of this unrepresented, psychotic defendant trying to represent himself in a capital murder trial.

Issue No. 6: Prosecutorial error in closing argument requires reversal of Mr. Cross' sentence of death.

Mr. Cross argued that the prosecutor erred when he told the jury that Mr. Cross' "hate crime" motive, his demeanor at trial, his lack of remorse, and the age of one of the victims, established that he committed capital murder in an especially heinous, atrocious, or cruel manner, under K.S.A. 21-6624(f). (Appellant's Brief, pp. 81, 85-87). In response, the State defended only the prosecutor's "hate crime" arguments, stating that they were proper under recent amendments to the statute, or, in the alternative, that any error was harmless. (Appellee's Brief, pp. 96, 100-101).

Use of the "hate crime" motive as evidence that the defendant committed the crime in a heinous, atrocious, or cruel manner is contrary to the plain words of the statute and the clear intention of the legislature.

No "hate crime" provisions appear in the amendments to K.S.A. 21-6624(f) and the plain words of that statute limit the jury's consideration to the defendant's conduct in the commission of the offense. Motive is not conduct. "Motive is the moving power which impels one to action for a definite result." *State v. Wells,* 289 Kan. 1219, Syl. ¶ 3, 221 P.3d 561 (2009).

The State resorts to the provisions that allow a jury to consider stalking, threats, preparation and planning, and desecration of the victim's body, and argues that these actions "delve into the mind of the defendant, not the victim." (Appellee's Brief, p. 99). The State also relies on the "catchall" of subsection (f)(7). (Appellee's Brief, p. 99).

While stalking, threats, preparation and planning, and desecration of the victim's body all require mental activity on the part of the defendant they are all acts, or, in the words of the statute, conduct - not "the moving power impelling an action." The plain language of the statute requires the jury find that "[t]he defendant **committed** the crime

in an especially heinous, atrocious or cruel manner," by considering the defendant's conduct ("**Conduct** which is heinous, atrocious or cruel may include, but is not limited to…" "any other **conduct** the trier of fact expressly finds is especially heinous."). K.S.A. 21-6624 (emphasis added).

While the legislature expanded the circumstances under which a jury could find that the defendant committed the crime in a heinous, atrocious, or cruel manner, the legislature did not expand those circumstances to include the defendant's motive when it allowed the consideration of other conduct.

The State is inviting this Court to supplement, through interpretation, K.S.A. 21-6624(f) with a hate crime provision. However, as this Court stated in *State v. Nambo,* 295 Kan. 1, Syl. ¶ 1, 281 P.3d 525 (2012):

> When interpreting a statute, the fundamental rule to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained. When language is plain and unambiguous, there is no need to resort to statutory construction. **An appellate court merely interprets the language as it appears; it is not free to speculate and cannot read into the statute language not readily found there.**

(emphasis added).

This Court may not, through statutory interpretation, add provisions to a statute, no matter how compelling the policy argument advanced by the State.

The Kansas Sentencing Guidelines have a "hate crime" provision. K.S.A. 21-6815(2)(C) provides that an upward departure sentence may be imposed upon a finding that "The offense was motivated entirely or in part by the race, color, religion, ethnicity, national origin or sexual orientation of the victim …" Presumably, the absence of similar language in K.S.A. 21-6624 is intentional. See, *Nambo*, 295 Kan. 4-5 (when the

legislature has shown that it knows how to act in certain areas, the Court may assume that its failure to do so in other areas is intentional).

The State's suggested harmless error analysis requires unconstitutional appellate re-weighing.

The jury that weighed the aggravating against mitigating circumstances in this case heard the prosecutor argue repeatedly and forcefully that the "hate crime" aspect of this case rendered his crime heinous, atrocious, or cruel. The State argues that evidence of the multiple death aggravating circumstance, as well as other evidence that Mr. Cross committed the crime in a heinous, atrocious, or cruel manner, renders the error harmless. To make that finding, this Court would be required to re-weigh evidence of the remaining aggravating circumstances against mitigating circumstances. This process was approved in *Clemons v. Mississippi*, 494 U.S. 738, 108 L.Ed.2d 725, 110 S.Ct. 1441 (1990), then, arguably, overruled by *Hurst v. Florida* , ___U.S. ___, 193 L.Ed.2d 504, 136 S.Ct. 616 (2016).

In *Clemons,* the United States Supreme Court approved re-weighing on the grounds that the constitution does not require that a jury make the findings required for a sentence of death. 494 U.S. 749, 753. "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." 494 U.S. 745. The Court cited *Spaziano v. Florida,* 468 U.S. 447, 82 L.Ed.2d 340, 104 S.Ct. 3154 (1984) and *Hildwin v. Florida,* 490 U.S. 638, 104 L.Ed.2d 728, 109 S.Ct. 2055 (1989) for its position.

Spaziano and *Hildwin* were "expressly" overruled in *Hurst*. "The Sixth Amendment requires a jury not a judge, to find each fact necessary to impose a sentence of death." 136 S.Ct. 619.

Under Kansas law, life without parole is the greatest sentence authorized by a conviction for capital murder, absent findings that (1) at least one aggravating circumstance exists, and (2) any aggravating circumstances found to exist are not outweighed by mitigating circumstances. K.S.A. 21-6617(e).

Therefore, under *Hurst*, the existence of an aggravating circumstance *and* the weight of that circumstance vis-à-vis the mitigating circumstances are both the functional equivalents of elements of the greater offense and those findings must be made by the jury. See, *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348 (2000)(any fact that increases penalty for crime beyond prescribed statutory maximum is a functional equivalent of an element of a greater offense and must be submitted to jury and proved beyond reasonable doubt) and *Ring v. Arizona*, 536 U.S. 584, 153 L.Ed.2d 556, 122 S.Ct. 2428 (2002)(aggravating factors in a capital trial which render defendant eligible for the death penalty operate as functional equivalents of elements of a greater offense as described in *Apprendi*, and must be submitted to jury and found beyond a reasonable doubt). The presence of an aggravating circumstance alone does not authorize imposition of the death penalty, the jury must still consider and weigh mitigating circumstances and assign weight to the aggravating circumstance(s) that it has found. *Hurst* clarified that the Sixth Amendment gives the defendant the right to a jury determination of that weight.

To determine, as the State urges, that this argument had no impact on the verdict, this Court would be required to, unconstitutionally, engage in re-weighing and substitute its speculation for the jury determination that is necessary under *Hurst.*

Issue No. 7: Mr. Cross' sentence of death must be vacated as it was based in part on the unconstitutionally vague provisions of K.S.A 21-6624(f)(7), in violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution and Section Nine of the Kansas Constitution Bill of Rights.

Mr. Cross argued that an amendment to the Kansas statute establishing aggravating circumstances, that defined heinous conduct as any conduct the jury considered to be heinous, negated the constitutionally required narrowing definition of the "heinous, atrocious, or cruel" aggravator and rendered it unconstitutionally vague, leaving the jury with unconstitutional open-ended discretion. (Appellant's Brief, pp. 90-91, 92-97). He further argued that because his sentence of death was based in part on this provision, it must be vacated. (Appellant's Brief, pp. 97-99).

The State responds that this Court rejected this argument in *State v. McLinn*, 307 Kan. 307, 409 P.3d 1 (2018). (Appellee's Brief, p. 102). In the alternative, the State argues that any error was harmless. (Appellee's Brief, pp. 102-103).

In *McLinn*, the claim was rejected on standing, not on the merits. This Court dismissed the claim because "[t]here [was] no evidence the jury knew of—much less resorted to—this seventh example of conduct in finding beyond a reasonable doubt that there was an aggravating circumstance in McLinn's case, nor [was] this seventh category the only category covered by her conduct." 307 Kan. 345. This Court found the defendant

had not shown the provision in question was unconstitutional as applied to her, citing *State v. Papen*, 274 Kan. 149, 162, 50 P.3d 37 (2002). *McLinn*, 307 Kan. 346.

Those bars to review do not exist in this case. As described in the opening brief, K.S.A. 21-6624(f)(7) was included in the notice of aggravating circumstances filed by the prosecution, included in the instructions to the jury, and argued extensively by the prosecutor, over Mr. Cross' objection. (Appellant's Brief, pp. 82-84, 91-92); (R. **5**, 231-232, 383; R. **49**, 34, 39-41, 43, 44-46). The death verdict was based in part on the jury's finding that the crime was heinous, atrocious, or cruel. (R. **5**, 391; R. **49**, 39). Unlike the *McLinn* jury, Mr. Cross' jury was aware of this provision, through the court's instructions. Unlike the *McLinn* jury, Mr. Cross' jury was informed by the prosecutor – with the court's explicit approval - that they could, and should, resort to this provision to find that Mr. Cross committed the crime in a heinous, atrocious, or cruel manner because it was a hate crime.

The State represents to this Court that Mr. Cross did not argue the statute was unconstitutionally vague as applied to him. (Appellee's Brief, p. 102). This is not correct. (Appellant's Brief, pp. 97-98). The State relied on the unconstitutionally vague provisions of K.S.A. 21-6624(f)(7) to argue that factors unrelated to Mr. Cross' conduct in the commission of the crime rendered the crime heinous, atrocious, or cruel. Mr. Cross has standing to raise this issue.

As to the State's assertion that any error is harmless, Mr. Cross would refer this Court to his reply in Issue No. 6.

Issue No. 8: The trial court committed reversible error when it excluded relevant mitigating evidence from the penalty phase of Mr. Cross' trial, in violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution, Section Nine of the Kansas Constitution Bill of Rights and K.S.A. 21-6617.

Mr. Cross argued that his offers to plead guilty in exchange for life in prison were evidence of acceptance of responsibility, a mitigating circumstance, and that the trial court erred in excluding this evidence in the penalty phase of his trial. (Appellant's Brief, pp. 100, 103-106) The State answers: 1) Mr. Cross' withdrawal of his offer renders it "not a mitigating circumstance;" 2) plea negotiations should not be admissible at trial; and 3) his offer to plead guilty was not evidence of acceptance of responsibility. (Appellee's Brief, p. 103).

The "withdrawn" offer referenced by the State was not one of the two offers that Mr. Cross sought to introduce as evidence. Those two were made before trial, through counsel, while he was still represented. (R. **21**, 18; R. **47**, 36; R. **19**, 19, 31; R. **50**, Defendant's Exhibit J, Defendant's Exhibit K). Further, Mr. Cross "withdrew" the referenced offer after the State rejected his conditions, as made clear by the trial court's comments:

> Well, let me jump in here, Mr. Miller, that – and, again, this is something between you and the State here – if you were to plead guilty, there is no plea bargain here because Mr. Howe is indicating that it won't change anything other than shortening our trial.

(R. **41**, 64-65).

As with his previous offers, Mr. Cross sought to enter a plea of guilty on conditions that the State rejected. The State cites no authority for the position that the fact the State rejected his offer negates its character as mitigating evidence.

The State argues that plea negotiations should not be admissible at trial because the defendant should not be allowed to use a prosecutor's offer against him. This might be an appropriate argument had Mr. Cross been attempting to proffer an offer of a life sentence from the State. But the State never agreed to a deal, and Mr. Cross sought only to introduce his offers. (R. **21**, 18; R. **47**, 36; R. **19**, 19, 31; R. **50**, Defendant's Exhibit J, Defendant's Exhibit K). There was no danger that the State would be required to argue against itself as described in the State's brief.

The State argues that an offer to plead guilty is not evidence of acceptance of responsibility unless it is unconditional. As demonstrated by the briefs, this is not a settled question. There is legal authority for the State's position as well as the contrary. The Kansas cases addressing a guilty plea as mitigation support the position that the plea need not be unconditional to be evidence of acceptance of responsibility. *State v. Jolly*, 301 Kan. 313, 328, 342 P.3d 935 (2015), and *State v. Bird*, 298 Kan. 393, 398-400, 312 P.3d 1265 (2013), (Appellant' Brief, p. 104), both concern guilty pleas in which the defendant received benefits beyond the ability to offer them as evidence in mitigation. In *Jolly* the prosecution dismissed two counts of aggravated indecent liberties with a child in return for the defendant's guilty plea to one count of rape. 301 Kan. 317. The defendant in *Bird* was charged with robbery, criminal threat, possession of cocaine, possession of marijuana, and possession of drug paraphernalia. He pleaded guilty to possession of cocaine, the prosecution dismissed the remaining drug charges, and he went to trial on threat and robbery charges. *Bird*, 298 Kan. 394.

The question of whether Mr. Cross' offers to plead guilty were evidence of acceptance of responsibility is actually a question of fact for the jury. It was the jury's province to determine the weight to assign Mr. Cross' evidence, after assessing all the surrounding circumstances, which the State would have been free to elicit on cross-examination. See, *State v. Brooks,* 297 Kan. 945, Syl. ¶ 2, 305 P.3d 634 (2013)("The jury is charged with the responsibility of weighing the evidence and determining witness credibility.")

The State finally argues that any error was harmless because the jurors heard Mr. Cross' assertions that he had offered to plead guilty. (Appellee's Brief, p. 110). The first time he mentioned his attempted plea, the jury was admonished, "Ladies and gentlemen, I do want to advise you to disregard the statement made by Mr. Miller just before you were asked to stop out for a brief recess." (R. **21**, 35). The second time referenced by the State was not actually a statement that he had offered to plead guilty, rather it was a statement that the prosecution "did not offer [him] a deal." (R. **46**, 15). The only other time Mr. Cross put this information in front of the jury, the State's objection was sustained. (R. **47**, 51-52). There was no admonition to the jury this time, but the jury was instructed to "disregard any testimony or exhibit which [the court] did not admit into evidence." (R. **49**, 19). "Jurors are presumed to follow the instructions they receive in the district court." *State v. Mattox*, 305 Kan. 1015, Syl. ¶ 2, 390 P.3d 514 (2017). It would be contrary to this Court's precedent to presume that the jurors considered his attempts to plead guilty during their penalty phase deliberations, after being instructed to disregard and not consider them.

The State also argues that the strong evidence supporting the aggravating factors renders the error harmless. (Appellee's Brief, p. 110). But to determine that the exclusion of this mitigation evidence had no effect on the weighing of the aggravating against mitigating circumstances would require this Court to re-weigh those circumstances, unconstitutionally substituting its judgment for jury findings, as explained in Issue No. 6.

Issue No. 9: The failure to instruct the jury on Mr. Cross' mitigating circumstance prevented the jury from having a proper vehicle to express its reasoned moral response to Mr. Cross' mitigating evidence.

The instruction would have allowed the jury to consider as mitigation that Mr. Cross' capacity "to conform his conduct to the requirements of law was substantially impaired." (R. **20**, 85). The State correctly points out that this instruction would have addressed the role mental illness played in these crimes. (Appellee's brief, 114, 116).

The State insists that Mr. Cross' mental state was a "social belief structure," not a mental illness. (Appellee's Brief, p. 115). However, this is a jury determination. A fixed belief in a secret world-wide conspiracy, which involves the trial judge and nurses plotting against him, reflects a severe delusion, and affected his capacity to conform his conduct to the law.

A normal person does not,

- suddenly wake up at age 73 and kill three innocent people to incite white people to start a revolution. (R. **18**, 28) (Appellee's Brief, p. 33).
- determine he killed enemy "accomplices." (R. **18**, 80, 83).
- think the court is following orders from his enemy. (R. **36**, 8).
- think his attorneys and court work for "the enemy." (R. **36**, 13).

- think his nurses are trying to murder him, and present that to the jury. (R. **47**, 35-37).
- think he can convince jurors in voir dire and penalty phase that a one-world government is imminent. (R. **41**, 135; **42,** 107; 109, **47**, 155; **48**, 79-84).
- think he would have become president of the United States if authorities had not stopped him. (R. **47**, 149).
- think the jurors are working to "enslave" the world. (R. **47**, 61)
- believe he might be sent to Israel for punishment after the trial. (R. **47**, 116)
- justify murder party because blond jokes have hurt blond kids' self-esteem. (R. **49**, 66).

The State does not point to anything that indicates the above was normal behavior. As it is, the record is riddled with evidence of a mental illness.

The State argues that Mr. Cross did not argue to the court that he was mentally ill. (Appellee's Brief, p. 113). He did, though. He specifically argued that his beliefs caused him to be impaired. (R. **20**, 86). Further, in determining whether there is factual support for a requested instruction, this Court is not limited by argument but also examines the entire record. See *State v. Ruiz-Ascencio*, 307 Kan. 138, 143, 406 P.3d 900, 904 (2017)(Court turns to the record of trial to determine whether there is factual support for instruction.) In this case not only did he argue that his beliefs made him "impaired," there was abundant factual support that his reason was impaired.

Mental health evidence is serious and compelling mitigating evidence a jury must consider in determining whether to impose life or death. See *Antwine v. Delo*, 54 F.3d 1357, 1368 (8th Cir.1995)(death sentence invalidated because counsel failed to present mitigating evidence of bipolar disorder).

Jurors were likely confounded by evidence of a mental illness that Mr. Cross' bizarre motive, and his behavior during trial, revealed. A potential juror accurately called the proceedings a "circus." (R. **43**, 108). To then deprive jurors of any vehicle in the verdict to consider whether the crimes were motivated by delusion or dementia—which an unwavering belief in a secret worldwide conspiracy suggests—or to consider the mental illness revealed by his behavior during trial as mitigation, was serious error.

The State acknowledges that Mr. Cross' requested instruction would have allowed the jury to consider mental illness, but the instruction the court gave did not. (Appellee's Brief, p. 114, 116).

Respectfully Submitted,

/s/ Reid T. Nelson
Reid T. Nelson #12726
Capital and Conflicts Appellate Defender
Capital and Conflicts Appeals Office
701 Jackson, Third Floor
Topeka, Kansas 66603
(785) 296-0546
Fax: (785) 296-7418
melson@sbids.org
Attorney for Defendant-Appellant

Frazier Glenn Cross, Jr.

/s/ Debra J. Wilson
Debra J. Wilson #11403
Capital and Conflicts Appellate Defender
Capital and Conflicts Appeals Office
701 Jackson, Third Floor
Topeka, Kansas 66603
(785) 296-0546
Fax: (785) 296-7418
dwilson@sbids.org
Attorney for Defendant-Appellant
Frazier Glenn Cross, Jr.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Appellant's Reply Brief was served by electronic mail, this 31st day of July, 2018, on

Stephen M. Howe
Johnson County District Attorney
Johnson County Courthouse
100 N. Kansas Avenue
Olathe, Kansas 66061-3273
(913) 715-3050
da@jocogov.org
Attorney for Plaintiff-Appellee, State of Kansas

Shawn E. Minihan
Assistant District Attorney
Johnson County Courthouse
100 N. Kansas Avenue
Olathe, Kansas 66061-3273
(913) 715-3050
Shawn.Minihan@jocogov.org

Derek Schmidt
Attorney General of Kansas
120 SW 10th Avenue, 2nd floor
Topeka, KS 66612
ksagappealsoffice@ag.ks.gov
Attorney for Plaintiff-Appellee
State of Kansas

/s/ Reid T. Nelson
Reid T. Nelson #12726